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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>RODNEY ANDERSON,<br><br>Defendant and Appellant. | H025640<br>(Santa Clara County<br>Super. Ct. No. CC234852) |

Defendant Rodney "Rabbit" Anderson was convicted after jury trial of two counts of conspiracy to manufacture methamphetamine (Pen. Code, § 182, subd. (a)(1); Health & Saf. Code,[1] § 11379.6, subd. (a)), one count of manufacturing methamphetamine (§ 11379.6, subd. (a)), and one count of providing space for the sale or manufacture of a controlled substance (§ 11366.5, subd. (a)). As to the first conspiracy count and the manufacturing charge, the jury also found true enhancement allegations that defendant was personally armed with a firearm (Pen. Code, § 12022, subd. (c)).

In a bifurcated proceeding, the court found true enhancement allegations that defendant had been convicted of two prior serious felonies that qualified as strikes under the Three Strikes Law (Pen. Code, §§ 667, subds. (b) – (i); 1170.12). The court

[1] All further statutory references are to the Health and Safety Code, unless otherwise stated.

subsequently granted defendant's *Romero*[2] motion and struck one of the prior strikes. The court sentenced defendant to the upper term of seven years on the first conspiracy to manufacture methamphetamine count, doubled the sentence to 14 years because of the strike prior pursuant to the Three Strikes law, and added four years for the enhancement for being personally armed with a firearm, for a total of 18 years. The court stayed the sentences on the other three counts pursuant to Penal Code section 654.

We reject defendant's claim that there was insufficient independent evidence to corroborate the testimony of three accomplice witnesses who testified against him. We also reject defendant's claims of instructional error related to the accomplice instructions (CALJIC Nos. 3.10, 3.13, and 3.16), the instruction regarding unjoined perpetrators (CALJIC No. 2.11.5), and the court's alleged failure to instruct on lesser-included offenses in count 2.

Defendant raises several claims of error related to the exclusion of evidence regarding the sentencing status of the accomplice witnesses, expectations of leniency those witnesses may have had in exchange for their testimony, and the grant of immunity to one of the witnesses. Although we conclude the court erred in excluding evidence regarding the grant of immunity, the error was harmless beyond a reasonable doubt. We find no error in the court's admission of alleged hearsay statements by one of the accomplice witnesses and conclude defense counsel was not ineffective in failing to object to hearsay statements by the investigating officers or portions of the prosecutor's closing argument.

Finally, we conclude that defendant's sentence did not violate *Blakely v. Washington* (2004) __ U.S. __, [124 S.Ct. 2531] (*Blakely*) since defendant's sentence did not exceed the statutory maximum sentence that could lawfully be imposed based upon the jury's verdict and facts which defendant had agreed could be decided by the court.

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[2] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 528-531.

We nonetheless remand the matter for resentencing based on correctly conceded error related to the four-year enhancement for being armed with a firearm.

## FACTS

### *I. Prosecution Case*

#### A. Introduction and Identification of Crime Scenes

The charges against defendant arose out of activities that occurred at two rural properties.

The first property was located at 50515 Mines Road, Livermore, California in a remote area near the Alameda-Santa Clara county line, about 20 to 25 miles east of the Lick Observatory (hereafter "Mines" or "the Mines property"). The 80-acre Mines property had belonged to defendant's parents. After defendant's parents died, the property passed to defendant's sister, Jennifer Rieboldt. Jennifer Rieboldt and her husband, Mark Rieboldt, lived in Concord. They kept cattle on the Mines property. Mark Rieboldt went to Mines twice a week to feed and tend the cattle.

Defendant and his siblings all had access to the Mines property and could come and go as they pleased. There were two double-wide mobile homes at Mines, one that family members lived in when they visited the property (the residential trailer) and one that they used for storage (the storage trailer).

The second property was a three- to five-acre horse ranch located at 14931 Clayton Road in San Jose (hereafter "Clayton" or "the Clayton property") that was rented to Larry Davis and his common law wife, Victoria Atwood. The structures on the Clayton property included a house, a two-story barn, a garage, and a travel trailer.

The prosecution case was based in part on the testimony of three individuals who the court found were accomplices as a matter of law: Rui Moniz, his girlfriend, Dawn Gruwell, and Larry Davis.

**B. Events at Mines Road Property**

Both Moniz and Gruwell used methamphetamine. Moniz started using in 1977 or 1978, at age 13. In the early to mid-1990's, Moniz started using methamphetamine heavily. By 1998, he was manufacturing methamphetamine. Another user showed him how to make it.

According to expert testimony at trial, most of the methamphetamine in California is manufactured using a recipe and method known as the "Mexican National Methamphetamine Process" (Mexican National method). Moniz manufactured methamphetamine using a different recipe and method known as the "push-pull" or "Beavis and Butthead" method. Moniz's method used a different ratio of ephedrine to red phosphorous, which results in a more volatile reaction that takes less time than other methods. Moniz could not make more than a pound of methamphetamine at a time using his method.

Moniz and Gruwell described their manufacturing operation as "mom and pop" or "small scale." They generally manufactured 200 grams (approximately one-half pound) of methamphetamine at a time, just what they needed for their personal use or to trade.

In May 2001, Moniz and Gruwell were arrested for manufacturing methamphetamine at Moniz's home on Birch Lane in San Jose (hereafter Birch). Rather than face the charges, Moniz and Gruwell decided to flee to Moniz's homeland, Portugal. After the terrorist attacks of September 11, 2001, Moniz and Gruwell put their travel plans on hold. Shortly thereafter, they met defendant through an associate that sold Moniz the red phosphorous he needed to manufacture methamphetamine. Moniz told defendant that he was in trouble with the law and needed a place to hide. Defendant told Moniz he owned a rural tract of land where Moniz and Gruwell might be able to hide. Moniz also talked to defendant about Moniz's method for making methamphetamine.

About a week later, defendant helped Moniz cook up about 200 grams of methamphetamine at Robert Vega's house in San Jose, using Moniz's cooking method. They planned to sell the methamphetamine. Defendant, Moniz, Gruwell, and Vega also used some of it.

While in Vega's garage, Moniz told Vega that defendant made methamphetamine at the Mines property. At first, Vega testified that defendant was nearby, heard Moniz's statement, and did not deny it. On cross-examination, Vega testified that defendant was not in the garage the entire time and may not have heard Moniz's statement. Vega also recalled defendant saying that "he used to make crank years ago back in the days" and " 'back in the days he used to do things.' " Defendant was very impressed with the batch of methamphetamine they made and with Moniz's cooking method. He said the methamphetamine was of good quality and offered to help Moniz and Gruwell.

In late September, early October 2001, defendant took Moniz to the Mines property, showed him some equipment and chemicals for making methamphetamine in the storage trailer, and asked him if he knew how to extract the methamphetamine that was left in some chemical solution. The equipment was stored in a hidden room in the storage trailer that had once been a bathroom. The bathroom door was covered with paneling that matched the paneling on the surrounding walls and hid the bathroom from view.

Moniz saw a large press, two 22-liter flasks that were used to cook methamphetamine, some gas cylinders, and other equipment. Defendant told Moniz the press was used to extract moisture and the cylinders were used to gas the solution to bring down the pH level and convert the liquid into a solid. Defendant said he could make 15 pounds of methamphetamine at a time using his method. Defendant told Moniz there was probably still some methamphetamine in the waste material from a previous cook and asked Moniz to try to extract the methamphetamine using Moniz's method of distillation. Defendant told Moniz the waste material came from a cook that had

produced 60 pounds of methamphetamine. Moniz and defendant tried to do the extraction together that night, but were unsuccessful.

On October 16, 2001, Moniz and Gruwell moved to the Mines property. While they were there, Moniz fixed a few generators, did some welding, tended the property and helped Mark Rieboldt build a dam. Defendant came up every few days and spent the night at Mines.

About four days after Moniz and Gruwell moved to Mines, defendant arrived around 9:00 or 10:00 p.m. with four or five Hispanic males. Defendant told Moniz they were cooking a 15-pound batch and to stay out of their way and out of the storage trailer. Moniz overheard defendant and the Hispanics arguing about the fact that Moniz and Gruwell were at the Mines property.

Although Moniz testified that he did not observe or help with any of the cooking, Gruwell testified that Moniz assisted with the production process. According to Gruwell, toward the end of the process, the men were having trouble extracting the methamphetamine from the solution and Moniz showed them how to extract the methamphetamine. Gruwell entered the trailer at one point and smelled chemicals she associated with methamphetamine production. She saw the men try to separate the methamphetamine from the liquid by filtering the solution through sheets that had been placed over a garbage can. An expert testified that this was one of the steps used in the Mexican National method.

The operation at Mines was on a much grander scale than what Moniz and Gruwell did. Gruwell overheard defendant tell Moniz the crew cooked methamphetamine every three months.

The Hispanic men left about two days after they arrived and took some of the equipment with them. Moniz testified that defendant had told him one of the reasons they took the equipment was that Mark Rieboldt had walked in on them during the cook

and told them to get out. Rieboldt denied knowing anything about the operation and testified that he never walked in on a methamphetamine lab.

After the cook, defendant gave Moniz $200 and some methamphetamine to clean up the storage trailer and put the equipment back in the hidden room. Moniz saw yellow and red iodine stains that he associated with cooking methamphetamine. The storage trailer also smelled like the chemicals that are used to make methamphetamine. According to Gruwell, the crew left behind a large pan of methamphetamine in powder form that Moniz was supposed to clean up and crystallize and some sludge that she and Moniz were supposed to pull some more methamphetamine out of. She did not perform the latter task, but Moniz did.

Defendant told Moniz there had been one previous cook at Mines involving "four pots" (glass flasks). He also told Moniz he had moved 40 cans of methamphetamine waste from Mines to Clayton before Moniz moved to Mines.

Moniz's friend, Roy Hernandez, brought Moniz some groceries one day. Defendant told Hernandez he could not stay very long because he was expecting company, some guys that were going to make some crank. While Moniz and Gruwell were at Mines, Davis and another friend of defendant's transported Moniz's and Gruwell's household goods to Mines on a large flatbed truck.

Vega testified that on an unspecified date, Moniz, Gruwell, and two unidentified men came to Vega's house looking for Moniz's lab equipment. He told them he had given it to Moniz's friend, Julie, as instructed by Moniz. Vega felt threatened. Vega eventually told law enforcement officers that Moniz and Gruwell were hiding at Mines.

On December 11, 2001, officers from the Drug Enforcement Administration (DEA) arrested Moniz and Gruwell at Mines on the outstanding warrants related to the manufacture of methamphetamine at Moniz's house in May 2001. The officers found paraphernalia and drugs belonging to Moniz and Gruwell inside the residential trailer. They also found indicia of manufacturing in the storage trailer, including two "HCL" gas

cylinders, a large hydraulic press, large circular trash pails with yellow, orange, and brown stains, acetone, lye, five-gallon solvent cans, four propane tanks, denatured alcohol, cat litter, tubing, and Coleman fuel cans. The investigating officer testified that these items are commonly found at methamphetamine labs and that these were the remnants of a cook. The officers also noted that there were items that are necessary for the manufacture of methamphetamine that were not in the storage trailer. The officers observed stains on the walls, floors, and ceiling that are characteristic of methamphetamine labs and noticed that the trailer smelled like the chemicals used to manufacture methamphetamine.

Two weeks after he was arrested, Moniz told the investigating officers that defendant and Larry Davis had transported solution containing methamphetamine to Davis's property on Clayton Road.

**C. Events at Clayton Road Property**

Davis's common law wife, Victoria Atwood, met defendant, whom she knew as "Rabbit," through her friend Rene McDonald in early November 2001. At that time, defendant, Atwood, McDonald, and a man named "Wanda" went to the Clayton Property to watch a meteor shower and party. While Davis slept, Atwood and her guests drank beer, smoked pot, and used methamphetamine. Davis awoke and was introduced to defendant.

Davis learned that defendant was an electrician and was looking for a place to stay in the valley. Davis agreed that defendant could stay in the travel trailer on the Clayton property in exchange for doing electrical and other repair work on the property. Defendant stayed at Clayton off and on until just before Christmas 2001.

In November 2001, defendant asked Davis to help him move some waste product from a previous project he had worked on. At that time, defendant did not drive or own a vehicle. Davis drove a one-ton plumbing truck that belonged to his employer. Defendant

knew Davis was having some financial difficulties and offered him $2,000 to move the material. At that point, Davis suspected the activity was illegal. However, he was behind on the rent and Christmas was coming, so he reluctantly agreed.

Defendant told Davis all he had to do was move the product from Mines to Clayton and store it at Clayton for three days. Defendant bought a blue trailer from his friend and employer, Kenny Freeman, for $300. Davis drove defendant to Milpitas or Fremont to pick up the trailer. They hooked the trailer up to Davis's truck, then drove to Mines to pick up the waste material.

When they entered the storage trailer at Mines, Davis saw 40 to 50 gray five-gallon metal cans. Defendant and Davis moved the metal cans and some five-gallon plastic buckets into the blue trailer. They also loaded some boxes and drums of trash and debris, including stained bed sheets that had been used to filter the methamphetamine, into the trailer. They then drove the trailer back to Clayton. Davis unhooked the trailer from his truck and went to work.

Defendant told Davis he made 200 pounds of methamphetamine every three or four months and that the stuff they had moved was the waste from one of those batches. He also told Davis that because of the cold weather, they had lost 40 to 60 pounds of methamphetamine back into the solution, and that there were 40 to 60 pounds of "remaining product" in the buckets that he had to process to get out.

At one point, defendant offered Davis $30,000 if he would let defendant and his friends use his barn for three days to cook up a batch of methamphetamine. Davis immediately declined and defendant never asked again.

Defendant did not pay Davis the $2,000 and did not remove the trailer from the Clayton property. Defendant kept making excuses for not picking up the trailer. He told Davis that he could not pay him until after he had reprocessed the waste. Several weeks later, defendant called Davis and demanded that Davis move the trailer to Fall Avenue in San Jose. Davis refused to drive the trailer on a public street again and told defendant to

come and get it. He was afraid that he would get caught, that he would never be paid, or that he was being set up. On three occasions, defendant threatened Davis if he did not comply. Once he left a message on Davis's answering machine, stating, "I want it moved. I want it put on Fall Avenue. And if you don't, I know where your children go to school."

Davis decided to move the trailer to another area on his property. When he attempted to move it, he noticed a strong odor and a liquid dripping from the trailer. He cut defendant's padlock off of the trailer, opened the trailer doors, smelled an extremely strong chemical odor, and noticed that the cans had started to corrode and were leaking. Davis poured the contents of the metal cans into two 55-gallon plastic drums and 18 to 20 five-gallon plastic buckets. He stacked the plastic buckets on a fiberglass tray on the second floor of his barn. He removed the tops and bottoms from the metal cans, flattened the sides, and put them in boxes outside his barn. Seven or eight of the metal cans had a brown, crystalline sludge in them. He put the sludge in a plastic bag inside a milk pitcher in his barn. This material was tested and consisted of 175.93 grams of methamphetamine. After he repackaged the chemical solution, Davis cleaned defendant's trailer and painted it white.

On January 31, 2002, DEA agents and local law enforcement officers went to Clayton to serve warrants on Atwood for outstanding traffic violations. One of the officers told Davis he had information that there was a methamphetamine lab on Davis's property and mentioned defendant's name. Davis told the officer he was storing some of defendant's stuff on the property and showed him the plastic drums, the plastic buckets, and the remnants of the gray metal cans. Davis told the officer he had helped defendant move the material from Mines to Clayton and that the material belonged to defendant. Davis described the solution in the drums and buckets as a "bi-layered" solution and seemed to know that it contained methamphetamine. The officers also found 13.5 grams of methamphetamine on the front porch of the house, which belonged to Atwood.

Atwood said defendant gave it to her. The lead officer told Davis that he would not be arrested that day, that the officers would prepare a report for the district attorney, and if the district attorney decided to bring charges, they would return with arrest warrants. Davis and Atwood were arrested about two weeks later for possession of precursors, manufacturing methamphetamine, and related offenses.

There were almost 200 gallons of solution in the plastic drums and buckets. The solution was composed of methamphetamine and a reaction by-product that is often present when the Mexican National method is used. Production of methamphetamine using the Mexican National process involves six steps. The fourth step in the process involves gassing the liquid solution to convert the liquid into a solid. One expert testified that the solution at Clayton had gone through at least the first three steps of the production process. He could not tell whether the solution had been gassed or completely processed.

Another expert testified that the material in the drums and buckets was a by-product was from the first three stages of the cooking process, that based on chromatogram studies, the major component of the solution was methamphetamine in relatively high concentrations, and that the solution had methamphetamine in it that could be "gassed out." The expert opined that the 200 gallons of product that were retrieved from Clayton resulted from the manufacture of close to 200 pounds of methamphetamine and that this was a large-scale operation that required more than two people to do the work. The first expert testified that one would have to have significant criminal associations to obtain the chemicals necessary to produce methamphetamine on this scale.

### *II. Defense Case*

Kenny Freeman was defendant's employer and had known defendant for five to seven years. They worked together regularly between August 2001 and February 2002.

He knew defendant from Alcoholics Anonymous. He never saw defendant use drugs. However, they rarely socialized outside of work.

None of the fingerprints on any of the items that were printed from the residential trailer belonged to defendant. There was no fingerprint evidence that tied defendant to the storage trailer. Defendant was not at either Clayton or Mines when Moniz, Gruwell, Davis, and Atwood were arrested.

Methamphetamine labs are categorized as "bubbling labs" (step one of the production process, in which the ingredients are heated and cooked), "fully operational labs" (all of the ingredients and equipment to process methamphetamine are present), or "boxed labs" (partially processed solution being stored or further processing). Officer Frechette categorized the chemical solution at Clayton as a boxed lab because there was still methamphetamine in the solution. Because of the amount of chemical present, Officer Frechette described Clayton as a "large-scale" lab. In his opinion, anyone with this much chemical solution in his or her possession is manufacturing methamphetamine.

In closing argument, defendant attacked the credibility of the accomplice witnesses. He argued that Moniz and Gruwell were manufacturing at Mines and that the chemicals found at Clayton were used to make methamphetamine at Clayton. He argued that Moniz, Gruwell, Davis, and Atwood were caught red-handed and conspired to blame defendant for their crimes and that there was insufficient evidence to find him guilty beyond a reasonable doubt.

## DISCUSSION

### *I. Sufficiency of the Evidence Corroborating the Accomplice Testimony*

Defendant contends his convictions must be reversed because they are based on accomplice testimony by Moniz, Gruwell, and Davis that was not sufficiently corroborated under Penal Code section 1111.

Penal Code section 1111 provides in part: "A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

"In enacting section 1111, the Legislature intended to eliminate the danger of a defendant being convicted solely upon the suspect, untrustworthy and unreliable evidence coming from an accomplice, who is likely to have self-serving motives that affect his [or her] credibility" such as the hope of favor or expectation of immunity. (*People v. Belton* (1979) 23 Cal.3d 516, 526; *People v. Tobias* (2001) 25 Cal.4th 327, 331.)

"The law requiring corroboration of accomplice testimony is well established." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128 (*Rodrigues*).) " ' "The requisite corroboration may be established entirely by circumstantial evidence. [Citations.] Such evidence 'may be slight and entitled to little consideration when standing alone. [Citations.]' " ' [Citations.] ' "Corroborating evidence 'must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged.' [Citation.]" ' [Citations.] In this regard, 'the prosecution must produce independent evidence which, without aid or assistance from the testimony of the accomplice, tends to connect the defendant with the crime charged. [Citation.]' [Citation.] ' "Corroborating evidence is sufficient if it substantiates enough of the accomplice's testimony to establish his [or her] credibility [citation omitted]." ' [Citation.]" (*Ibid.*)

The evidence necessary to corroborate an accomplice "must come in by means of the testimony of a nonaccomplice witness. [Citation.] It need not corroborate every fact to which the accomplice testified or establish the corpus delicti, but is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth. [Citation.]" (*People v. Fauber* (1992) 2 Cal.4th 792, 834-

835.) Furthermore, "[t]he existence of a conspiracy may be proved by uncorroborated accomplice testimony; corroboration of accomplice testimony is needed only to connect the defendant to the conspiracy." (*People v. Price* (1991) 1 Cal.4th 324, 444, superseded by statute on other grounds as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161-1165.)

"[T]he entire conduct of the parties, their relationship, and their acts during and after the crime may be taken into consideration by the jury in determining the sufficiency of the corroboration of an accomplice's testimony. [Citations.]" (*People v. Narvaez* (2002) 104 Cal.App.4th 1295, 1305.)

The trier of fact's determination on the issue of corroboration is binding on the appellate court unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime. (*People v. McDermott* (2002) 28 Cal.4th 946, 985.) Applying the foregoing rules, we conclude there was substantial corroborative evidence connecting defendant to the crimes in question.

There was corroborating evidence that linked defendant to activities at both Mines and Clayton. Mark Rieboldt and defendant's stepmother testified that defendant had access to the Mines property. Rieboldt and Freeman testified that defendant could come and go as he pleased. Defendant told Hernandez that the property belonged to defendant and his siblings and that defendant lived there. Moniz's wife, Anita Moniz, testified that defendant lived with her for a while after Moniz and Gruwell moved to Mines. When he lived at Moniz's house, defendant would stay there one or two nights and then be away for three or four nights. Hernandez saw defendant at Mines. This corroborated Moniz's testimony that defendant occasionally stayed at Mines. While presence at the location is insufficient alone to meet the requirements of Penal Code section 1111, presence is a fact that may be used in conjunction with other evidence to establish corroboration. (*People v. Medina* (1974) 41 Cal.App.3d 438, 466.)

Hernandez visited Mines and saw the press, a paint-like substance on the floor, and some five-gallon buckets. Hernandez testified that defendant once told him he had to leave Mines because some guys were coming up to the property to make some crank and would not want to see strangers there. Hernandez also testified that after Moniz was arrested, defendant showed up at Hernandez's house, pointed a gun at him, asked where Moniz was, and said Moniz was going to get defendant into a lot of trouble if he did not keep his mouth shut and said if he could not find someone to do something about it he would take care of it himself.

The extensive physical evidence and indicia of manufacturing that DEA agents found at Mines tended to corroborate Moniz's testimony that the defendant and others made methamphetamine at Mines and that Moniz cleaned up after the process, as well as Gruwell's testimony that Moniz assisted in processing the methamphetamine. Officer Pickens and a fingerprint expert testified that Moniz's fingerprints were on some of the items they seized from the hidden room.

Expert testimony that it takes three or more persons to manufacture methamphetamine in the quantities found at Clayton tended to corroborate Moniz's and Gruwell's testimony that a group of men cooked methamphetamine at Mines. Mark Rieboldt testified that he once ran into a group of Hispanic men on the Mines property.

Vega testified that defendant told him he used to make methamphetamine in the past and that when they made methamphetamine in Vega's garage, defendant seemed to understand the process and required little direction from Moniz. The prosecution also relied on Vega's testimony that defendant heard Moniz tell Vega that defendant made methamphetamine at Mines and did not deny the statement. On cross-examination, Vega admitted that defendant might not have been in the garage when Moniz made the statement. Defendant attacks the sufficiency of this evidence as corroboration of the accomplice testimony based on Vega's credibility. However, it was up to the jury to decide whether Vega was credible and to determine how much weight to give to this

testimony. In addition, there was other evidence the jury could rely on to corroborate the accomplice testimony.

Freeman testified that in the fall of 2001, he sold defendant a trailer that looked like the trailer that the officers found at Clayton, except for the color. Freeman also stated that defendant and a person who matched Davis's description and drove a full sized pick-up that matched the description of Davis's vehicle picked up the trailer on Fremont Boulevard, north of Grimmer. This corroborates Davis's testimony regarding how he and defendant obtained the trailer the night they moved the cans of solution from Mines to Clayton. The physical evidence at Clayton included 40 or 41 gray metal cans of the kind that were found at Mines that had had their tops and bottoms sheared off and their sides flattened. This evidence corroborated Davis's testimony that he and defendant moved 40 to 50 cans of solution to Clayton.

The court did not find that Atwood was an accomplice as a matter of law. There is nothing in the record that indicates that the jury found her to be an accomplice as a matter of fact. Her testimony may therefore be used for corroboration. Atwood testified that the trailer appeared on the property one morning while defendant was staying at Clayton, that she saw defendant move buckets from the trailer to the barn, that defendant had asked Davis to move the trailer again, and that after defendant left Clayton, he left threatening messages on Davis's answering machine. This evidence linked defendant to the trailer and its contents and corroborated Davis's testimony regarding the threatening messages defendant left on Davis's answering machine relating to the trailer.

In our view, this evidence reasonably tends to connect defendant to the conspiracies and the other crimes charged at Mines and Clayton. Consequently, we find no error related to the sufficiency of the evidence corroborating the accomplice testimony.

## *II. Instructional Error*

### A. Jury Instructions Regarding Accomplice Testimony (CALJIC Nos. 3.10, 3.13, & 3.16)

The court gave a series of instructions regarding the manner in which the jury should view the testimony of accomplices, including CALJIC Nos. 3.10 (definition of accomplice), 3.11 (testimony of accomplice must be corroborated), 3.12 (sufficiency of evidence to corroborate accomplice), 3.13 (one accomplice may not corroborate another), 3.16 (witness accomplice as a matter of law), and 3.18 (testimony of accomplice must be viewed with care and caution). Defendant contends the trial court committed prejudicial error by giving modified versions of CALJIC Nos. 3.10 and 3.16 and misreading CALJIC No. 3.13. The Attorney General argues that defendant has waived any claim of error by failing to raise it in the trial court, that the instructions were not erroneous, and that if there was error, it was harmless.

As for the waiver issue, instructional error that affects the substantial rights of a defendant may be raised on appeal even if no objection was made in the trial court. (Pen. Code, § 1259; *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7.) The corroboration requirement of Penal Code section 1111 is a substantial right. (*Rodrigues, supra*, 8 Cal.4th at p. 1132.) We shall therefore review the issue, even though there was no objection below.

CALJIC No. 3.10 defines an accomplice. The standard version of the instruction provides: "An accomplice is a person who [is] [was] subject to prosecution for the identical offense charged against the defendant on trial by *reason of [aiding or abetting] [or] [being a member of a criminal conspiracy]*." (CALJIC No. 3.10; italics added.) The court gave a modified version of CALJIC No. 3.10 that omitted the italicized final clause of the standard instruction. The jury was instructed that: "An accomplice is a person who [was] subject to prosecution for the identical offense charged against the defendant on trial."

We perceive no error in this omission. After the prosecution rested, the court found that Moniz, Gruwell, and Davis were accomplices as a matter of law. CALJIC No. 3.10 is unnecessary if the court determines that a witness is an accomplice as a matter of law and CALJIC No. 3.16 is given. (Use Note to CALJIC No. 3.10 (July 2004 ed.) p. 107.) That was the case here. Since the court determined that Moniz, Gruwell, and Davis were accomplices as a matter of law, the jury had no occasion to apply the definition in CALJIC No. 3.10. Defendant does not contend that the modification of the instruction affected the jury's ability to find that any of the other witnesses were accomplices as a matter of fact. We therefore do not address that point.

CALJIC No. 3.13 provides that one accomplice may not corroborate another accomplice. The instruction reads as follows: "The *required* corroboration of the testimony of an accomplice *may* not be supplied by the testimony of any or all of [his] [her] accomplices, but must come from other evidence." (Italics added.) When it instructed the jury, the court misread CALJIC No. 3.13 and stated: "The *recorded* corroboration of the testimony of an accomplice *need* not be supplied by the testimony of any or all of the accomplices but must come from other evidence." (Italics added.) However, the written instruction that accompanied the jury into the deliberation room provided: "The *required* corroboration of the testimony of an accomplice *may* not be supplied by the testimony of any or all of the accomplices, but must come from other evidence." (Italics added.) The written instruction used the language of the standard instruction, except that it substituted "the" for the adjectives "[his] [her]" suggested in CALJIC No. 3.13. Defendant appropriately does not complain of this minor variance in the written instruction.

As long as the court provides the jury with written instructions to take into the deliberation room, they govern any conflict with the instructions delivered orally. (*People v. Osband* (1996) 13 Cal.4th 622, 717.) "[M]isreading instructions is at most harmless error when the written instructions received by the jury are correct." (*People v.*

*Box* (2000) 23 Cal.4th 1153, 1212 citing *People v. Osband, supra,* 13 Cal.4th at p. 687.) That was the case here.

CALJIC No. 3.16 provides: "If the crime of _____ was committed by anyone, the witness _____ was an accomplice as a matter of law and [his] [her] testimony is subject to the rule requiring corroboration." The court gave the following modified version of CALJIC No. 3.16: "If the crime of Violating Section 11379.6(a) of the Health and Safety Code was committed by anyone, the following witnesses are accomplices as a matter of law and their testimony is subject to the rule requiring corroboration: DAWN GRUWELL – RUI MONIZ – LARRY DAVIS."

Defendant contends the trial court erred because the instruction did not identify all of the offenses to which these witnesses were accomplices and to which the accomplice instructions applied and strongly implied that the accomplice witnesses were only accomplices to the manufacturing charge and not the other counts. Defendant argues that the only reasonable inference to be drawn from this instruction was that the instructions regarding accomplice testimony only applied to the manufacturing count. Defendant asserts that the omission of the aiding and abetting and conspiracy language from CALJIC No. 3.10 reinforced the error.

Defendant was charged with two counts of conspiracy to manufacture methamphetamine (Pen. Code, § 182, subd. (a)(1); § 11379.6, subd. (a)), one count of manufacturing methamphetamine (§ 11379.6, subd. (a)), and one count of providing a place for the manufacture of methamphetamine (§ 11366.5, subd. (a)). The modified CALJIC No. 3.16 instruction refers to the "crime of violating section 11379.6(a) of the Health and Safety Code . . . ." The information alleged two counts of conspiracy "to commit . . . a violation of section 11379.6(a) of the Health and Safety Code" and a "violation of Health and Safety Code section 11379.6(a)" in the manufacturing count. Since the instruction cites the same Health and Safety Code section that is cited in the

conspiracy and the manufacturing counts, the jury reasonably could have concluded that the instruction applied to all three counts.

The prosecutor discussed accomplice testimony and the manner in which the jury should view the accomplice testimony at length in his closing argument. He told the jury that they should cut out the accomplice testimony and first determine whether there is some slight evidence that "tends to connect the defendant with the commission of the crime charged." He told the jury that once they found corroborating evidence, they could consider the testimony of the accomplices and determine whether defendant was guilty beyond a reasonable doubt. The prosecutor did not argue or suggest to the jurors that the requirement for the corroboration of accomplice testimony applied only to the manufacturing count. Likewise, there was nothing in defendant's closing argument that suggested that the instructions regarding accomplice testimony only applied to the manufacturing count. Nothing in the record suggests the jury was confused as to this point. While it would have been preferable for the court list all of the offenses that were at issue at trial in the CALJIC No. 3.16 instruction, under the circumstances of this case, we do not believe the failure to do so was error.

Even if we were to assume there was error, it was not prejudicial. As we have already demonstrated, the evidence amply tended to connect defendant to all of the crimes charged. Based on the strength of the evidence, there is no reasonable probability that the jury would have reached a different result had the instruction listed all of the offenses that were at issue at trial. (*Rodrigues, supra*, 8 Cal.4th at p. 1132; *People* v. *Watson* (1956) 46 Cal.2d 818, 836.)

**B. CALJIC No. 2.11.5**

Without objection from defendant, the trial court instructed the jury regarding unjoined perpetrators with CALJIC No. 2.11.5. The instruction provided: "There has been evidence in this case indicating that a person other than defendant was or may have

been involved in the crime for which the defendant is on trial. [¶] There may be many reasons why such person is not here on trial. Therefore, do not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether [he] has been or will be prosecuted. Your [sole] duty is to decide whether the People have proved the guilt of the defendant on trial."

Defendant contends it is reversible error to give CALJIC No. 2.11.5 when accomplice instructions are also given. He argues that the instruction in CALJIC No. 2.11.5 not to " 'give any consideration as to why the other person is not being prosecuted in this trial or whether [he] has been or will be prosecuted' " conflicts with the accomplice instructions because the status of the accomplices' prosecution necessarily affects their credibility. Defendant asserts that the court gave CALJIC No. 2.11.5 because of the testimony that unidentified Hispanic males cooked methamphetamine at Mines and complains that the instruction did not distinguish between accomplices who testified and those that did not. The Attorney General argues that the court properly instructed the jury with CALJIC No. 2.11.5 and that any error in giving the instruction was harmless in light of the other instructions and the overwhelming evidence of defendant's guilt. We find no prejudicial error.

CALJIC No. 2.11.5 applies to people who may have been involved in the crime, whether or not they qualify as accomplices. (*People v. Williams* (1997) 16 Cal.4th 153, 226 (*Williams*).) "The purpose of the challenged instruction is to discourage the jury from irrelevant speculation about the prosecution's reasons for not jointly prosecuting all those shown by the evidence to have participated in the perpetration of the charged offenses, and also to discourage speculation about the eventual fates of unjoined perpetrators." (*People v. Price, supra,* 1 Cal.4th at p. 446.) Another purpose for the instruction "is to focus the jury's attention on an individualized evaluation of the evidence against the person on trial without extraneous concern for the fate of other

participants *irrespective* of their culpability." (*People v. Cox* (1991) 53 Cal.3d 618, 668; italics added, fn. omitted.)

" 'CALJIC No. 2.11.5 . . . should not be given when a nonprosecuted participant testifies because the jury is entitled to consider the lack of prosecution in assessing the witness's credibility.' [Citations.]" (*Williams, supra*, 16 Cal.4th at p. 226.) This limitation on instructing with CALJIC No. 2.11.5 did not apply to Moniz's, Gruwell's or Davis's testimony because each of these witnesses had been prosecuted. Moniz testified that he had pleaded guilty to manufacturing methamphetamine at both Birch and Mines. Davis told the jury that he had been tried for manufacturing and selling methamphetamine, that his trial resulted in a hung jury, that he subsequently pleaded to a lesser charge to avoid retrial, and that he spent nine to 10 months in jail. Gruwell testified that she had been charged with manufacturing at both Birch and Mines, that she pleaded guilty to manufacturing at Birch, and that the charges regarding Mines were dismissed. Thus, the jury was advised that each of these witnesses had been prosecuted.

Moreover, our Supreme Court has declined to label a mistake in giving CALJIC No. 2.11.5 as error in cases such as this. (*People v. Jones* (2003) 30 Cal.4th 1084, 1113-1114 (*Jones*).) In *Jones*, the court explained: "As defendant correctly observes, we have often said that trial courts should not give CALJIC No. 2.11.5 in an unmodified form when, as here, a person who might have been prosecuted for the crime has testified at trial. [Citations.] The impact of this mistaken instruction, however, was ameliorated because the court gave proper instructions that in assessing the credibility of witnesses the jury could consider '[t]he existence or nonexistence of a bias, interest, or other motive' and '[t]he witness'[s] prior conviction of a felony.' (CALJIC No. 2.20.) The jury was again instructed: 'The fact that a witness has been convicted of a felony . . . may be considered . . . only for the purpose of determining the credibility of the witness.' (CALJIC No. 2.23.) Finally, the jury was told that the testimony of an accomplice should be viewed with mistrust. (CALJIC No. 3.18.) . . . We have declined to label a mistake

in the giving of CALJIC No. 2.11.5 as error when, as here, 'the instruction is given with the full panoply of witness credibility and accomplice instructions.' [Citation.]" (*Jones*, *supra*, 30 Cal.4th at pp. 1113-1114.)

As in *Jones*, the trial court gave proper instructions that in assessing the credibility of a witness the jury could consider the existence or nonexistence of a bias, interest, or other motive and the witness's prior conviction of a felony. (CALJIC No. 2.20.) The court also instructed that the fact that a witness had been convicted of a felony may be considered for the purpose of determining the credibility of the witness. (CALJIC No. 2.23.) In addition, the court instructed the jury regarding accomplice testimony and told the jury that the testimony of an accomplice should be viewed with caution. (CALJIC No. 3.18.) " 'When [CALJIC No. 2.11.5] is given with the full panoply of witness credibility and accomplice instructions, as it was in this case, [jurors] will understand that although the separate prosecution or nonprosecution of coparticipants, and the reasons therefor[e], may not be considered on the issue of the charged defendant's guilt, a plea bargain or grant of immunity may be considered as evidence of interest or bias in assessing the credibility of prosecution witnesses. [Citation.]" (*People v. Lawley* (2002) 27 Cal.4th 102, 162.) Even in cases in which the instruction should be clarified or omitted, it is not error to give the instruction. (*Id.* at pp. 162-163.) Thus, the trial court did not err in giving CALJIC No. 2.11.5.

**C. Failure to Instruct on Lesser Included Offense on Count Two**

The jury convicted defendant in count two of conspiracy to manufacture methamphetamine arising out of the transfer of the methamphetamine solution from Mines to Clayton. Defendant contends that the trial court erred by failing to instruct the jury on count 2 regarding the lesser included offense of possessing precursor chemicals with the intent to manufacture methamphetamine (§ 11383, subd. (c)). Defendant asserts there was substantial evidence that the scope of the conspiracy on count 2 was only to

possess precursors and not to actually manufacture methamphetamine. He argues that Davis only agreed to transport the solution and hold it temporarily; that Davis never agreed to make methamphetamine and declined defendant's offer to pay him $30,000 to use his barn to manufacture methamphetamine.

The Attorney General argues that the evidence showed that defendant had manufactured methamphetamine and that the agreement that was the basis of the conspiracy was to manufacture methamphetamine, not possess precursors. The Attorney General contends that the trial court was not required to instruct regarding the lesser offense because there was not substantial evidence to support a jury determination that defendant was guilty only of the lesser offense.

" ' "It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." [Citation.] That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.] The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given. [Citations.] Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense. [Citation.]' [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155 (*Breverman*).)

"[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever

evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is ' "evidence from which a jury composed of reasonable [persons] could . . . conclude[]" ' that the lesser offense, but not the greater, was committed. [Citations.] [¶] In deciding whether there is substantial evidence of a lesser offense, courts should not evaluate the credibility of witnesses, a task for the jury. [Citations.]" (*Breverman, supra,* 19 Cal.4th at p. 162.)

The prosecution must prove the following elements in order to prove the lesser included offense of possession of precursors with intent to manufacture methamphetamine (§ 11383, subdivision (c)(1)): (1) that the defendant possessed ephedrine or pseudoephedrine or a substance containing ephedrine or pseudoephedrine or any salts, isomers, or salts of isomers of ephedrine or pseudoephedrine or any combination of substances specified in section 11383, subdivision (c)(1)[3]; and (2) that the

[3] Section 11383, subdivision (c)(1) provides: "Any person who, with intent to manufacture methamphetamine or any of its analogs specified in subdivision (d) of Section 11055, possesses ephedrine or pseudoephedrine, or any salts, isomers, or salts of isomers of ephedrine or pseudoephedrine, or who possesses a substance containing ephedrine or pseudoephedrine, or any salts, isomers, or salts of isomers of ephedrine or pseudoephedrine, or who possesses at the same time any of the following, or a combination product thereof, is guilty of a felony and shall be punished by imprisonment in the state prison for two, four, or six years: [¶] (A) Ephedrine, pseudoephedrine, norpseudoephedrine, N-methylephedrine, N-ethylephedrine, N-methylpseudoephedrine, N-ethylpseudoephedrine, or phenylpropanolamine, plus hydriodic acid. [¶] (B) Ephedrine, pseudoephedrine, norpseudoephedrine, N-methylephedrine, N-ethylephedrine, N-methylpseudoephedrine, N-ethylpseudoephedrine, or phenylpropanolamine, thionyl chloride and hydrogen gas. [¶] (C) Ephedrine, pseudoephedrine, norpseudoephedrine, N-methylephedrine, N-ethylephedrine, N-methylpseudoephedrine, N-ethylpseudoephedrine, or phenylpropanolamine, plus phosphorus pentachloride and hydrogen gas. [¶] (D) Ephedrine, pseudoephedrine, norpseudoephedrine, N-methylephedrine, N-ethylephedrine, N-methylpseudoephedrine, N-ethylpseudoephedrine, chloroephedrine and chloropseudoephedrine, or phenylpropanolamine, plus any reducing agent."

person had the specific intent to manufacture methamphetamine or any of its analogs. (§ 11383, subd. (c)(1); CALJIC No. 12.09.4 (July 2004 ed.).)

Greg Avilez, an employee of the Department of Justice Criminalistics Laboratory and an expert in the manufacture of methamphetamine and the testing of solvents, tested the solution inside the two 55-gallon drums and two of the buckets recovered from Clayton. He testified that the solution consisted of methamphetamine and phenyl-2-propanone, a by-product or "side reaction" of the Mexican National method. He also testified that the solution had already been through at least the first three stages of methamphetamine production, that methamphetamine was the major component of the solution, and that it was not his opinion that the solution simply contained precursors. Officer Frechette testified that someone who had the quantity of solution they found at Clayton was involved in manufacturing, not just possessing precursors. Thus, the expert testimony tends to belie defendant's claim that Davis was in possession of precursors. The solution in the drums and buckets consisted of methamphetamine that had been partially processed and a by-product of the production process. There was no evidence that it contained any of the ingredients specified in section 11383, subdivision (c)(1).

Count 2 alleged that defendant conspired with Davis "and others" to manufacture methamphetamine. The fact that Davis did not personally manufacture methamphetamine does not negate the existence of the conspiracy to manufacture. Defendant and Moniz tried to extract methamphetamine from the solution when it was stored at Mines. Defendant told Davis that there were 40 to 60 pounds of methamphetamine suspended in the solution. Later, he told Davis that he would not be able to pay him the $2,000 for moving the trailer until after he had processed the solution further. Defendant also told Moniz there was methamphetamine in the solution. For these reasons, we conclude that evidence that defendant was guilty of the lesser included offense of possession of precursors was not substantial enough for the jury to conclude

that the lesser, but not the greater offense was committed and that the trial court did not err in failing to instruct the jury regarding the lesser included offense.

In a noncapital case, error in failing to instruct on lesser included offenses which are supported by the evidence requires reversal only if, after an examination of the entire record, it appears reasonably probable that the defendant would have obtained a more favorable outcome had the error not occurred. (*Breverman, supra,* 19 Cal.4th at pp. 162, 178; *People* v. *Watson*, *supra*, 46 Cal.2d 818, 836.) Even if we assume the trial court erred in failing to instruct on the lesser included offense, we are convinced, in light of the expert evidence and the evidence of defendant's involvement in the manufacture of methamphetamine, that it is not reasonably probable a different result would have occurred had the trial court given the lesser included offense instruction.

***III. Exclusion of Evidence***

Defendant contends the trial court committed reversible error when it limited his cross-examination of Moniz, Gruwell, Davis and Atwood (hereafter "the accomplice witnesses") by excluding evidence that the accomplice witnesses were pending sentencing and that they might hope for or expect leniency in exchange for their testimony. Defendant also asserts the court erred when it excluded evidence that Gruwell had submitted a false urine sample and evidence that Davis received transactional immunity from prosecution for perjury. These claims of error arise out of three separate rulings by the trial court. Defendant contends that the exclusion of this evidence violated his Sixth Amendment right to confront the witnesses for the prosecution.

At the time of defendant's trial, Moniz, Gruwell, Davis, and Atwood had each entered guilty pleas and were awaiting sentencing. The prosecutor made a pretrial motion in which he represented to the court that neither the district attorney's office nor the judge that took the accomplice witnesses' pleas promised them anything in exchange for their testimony in this case. The prosecutor then asked that questions related to any

benefit the accomplice witnesses expected to receive as a result of their testimony be limited to whether or not they had actually been promised a benefit by the court or the district attorney and that if the answer was "no," that the defendant not be allowed to ask whether they hoped or expected to get anything out of their testimony. The court agreed that it would be pure speculation on the witnesses' part if they had not been promised anything and granted the motion.

Defense counsel argued that it would be important for the jurors to know whether the accomplice witnesses believed they were going to get something for testifying. She pointed out that Moniz and Gruwell were both out of custody, attending drug treatment programs. The court ruled that defense counsel could not ask questions "beyond the conviction and the fact that [the witness was] convicted without promise by the authorities for any benefit." The court also ruled that defense counsel could ask the witnesses why they pleaded guilty and ask the investigating officers what they arrested the witnesses for. The court stated that if there was a reduction in the charge then that was something else the defense could inquire about. The prosecutor responded that some of the accomplice witnesses' charges were reduced as a result of insufficiency of the evidence and that if defense counsel wanted to get into that issue, he would have to call witnesses from the district attorney's office to explain their policy. The court concluded that pleading to a reduced charge is not a benefit if the evidence does not support the original charge.

The prosecutor also moved in limine to exclude evidence that Gruwell submitted a false urine sample to the probation department for testing while she was on probation for charges arising out of the events at issue in this case. The prosecutor explained that Gruwell had not been charged with any crimes arising out of the incident involving the false sample and argued that while defendant might characterize this as dishonest conduct, it was not a crime of moral turpitude. The court agreed and excluded the evidence.

Finally, before Davis testified, he advised the prosecutor that some of the testimony he gave at his own trial was false and inconsistent with the testimony he was expected to give at defendant's trial. Davis therefore sought and obtained transactional immunity from the district attorney from any future prosecution for perjury arising out of Davis's testimony at his own trial. The prosecutor then inquired of the court whether it felt the grant of immunity was a benefit to Davis that defense counsel would be allowed to inquire about during cross-examination. Defense counsel argued that the grant of immunity was a benefit that she should be able to inquire about. The court ruled that it did not consider it a benefit to testify under a grant of transactional immunity and told defense counsel, "Your benefit is to impeach him with his prior statements under oath. I would then leave it to the jury to determine who's credible under these circumstances."

Defendant cites *Delaware v. Van Arsdall* (1986) 475 U.S. 673 (*Van Arsdall*) and *People v. Dyer* (1988) 45 Cal.3d 26 (*Dyer*). In *Van Arsdall*, the defendant in a murder trial sought to discredit the testimony of witness Fleetwood by questioning Fleetwood about the dismissal of a criminal charge (drunkenness on a highway) that had been filed against him in an unrelated matter after Fleetwood agreed to speak with the prosecutor about the murder. (*Van Arsdall, supra,* 475 U.S. at p. 676.) The prosecutor objected to the question and the court held an in camera hearing in which Fleetwood admitted that the drunkenness charge had been dropped in exchange for his agreement to speak with the prosecutor about the murder, but denied that the agreement affected his testimony at the murder trial. The trial court prohibited the defendant from cross-examining Fleetwood on the point, finding that the prejudicial effect of the evidence outweighed its probative value. The Delaware Supreme court concluded that facts concerning Fleetwood's bias that were central to assessing his credibility were kept from the jury, that the error resulted in a violation of the confrontation clause, and was reversible per se. The United States Supreme Court agreed that there had been a violation of the confrontation clause because the agreement provided Fleetwood with a motive to give

false testimony, but concluded that the denial of the defendant's opportunity to impeach the witness for bias was subject to harmless error analysis under *Chapman* v. *California* (1967) 386 U.S. 18 (*Chapman*).

The California Supreme Court addressed a similar contention in *Dyer*, *supra*, 45 Cal.3d at pp. 46-50. The court stated that it is a "well established principle that the defense is entitled to elicit evidence that a witness is motivated by an expectation of leniency or immunity [citations] or that he [or she] is on probation or parole." (*Id.* at pp. 49-50.) Quoting *Van Arsdall*, the *Dyer* court observed, " 'trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination [into the potential bias of a prosecution witness] based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or *only marginally relevant*.' [Citation.]" (*Id*. at p. 48.) The court also applied the harmless error standard from *Chapman*, *supra*, 386 U.S. 18. (*Dyer, supra*, 45 Cal.3d at pp. 48-49; see also *People v. Rodriguez* (1986) 42 Cal.3d 730, 750-751, fn. 2 (*Rodriguez*).)

Defendant contends that he should have been allowed to inquire into the following areas on cross-examination: (1) the arrests of the accomplice witnesses; (2) the original charges against the accomplice witnesses; (3) the charges to which the accomplice witnesses entered guilty pleas; (4) that fact that the accomplice witnesses were still pending sentencing when they testified at defendant's trial; (5) the fact that these witnesses hoped to receive benefits from the prosecution in exchange for their testimony (6) that fact that Davis received immunity; and (7) the evidence of moral turpitude by Gruwell. Presumably, the latter point refers to the incident involving the false urine sample. Defendant argues that he should have been allowed to establish a factual basis from which to argue that the accomplice witnesses had motives to lie in favor of the prosecution, but was limited to far less probative impeachment evidence.

We find no error related to the first three areas of inquiry defendant complains about. Defendant does not elaborate on the question of the arrests or tell us what additional information he should have been allowed to ask regarding arrests of the accomplice witnesses. The jury heard that each of the accomplice witnesses was arrested, the dates of their arrests, and the circumstances surrounding the arrests. The court told defense counsel she could ask the law enforcement officers what they arrested the accomplice witnesses for.[4] The court also told defense counsel she could ask the accomplice witnesses what they were convicted of, which encompassed their guilty pleas. Thus, there is no merit to defendant's claims with regard to the first three areas of inquiry he has placed in issue and we find no error.

As to all four witnesses, defendant claims that he should have been allowed to elicit the facts that the accomplice witnesses were still pending sentencing when they testified at defendant's trial (defendant's fourth claim of error) and that they hoped to receive benefits from the prosecution in exchange for their testimony (defendant's fifth claim of error). The trial court's order precluded cross-examination on these points.

At trial, Moniz told the jury that he had pleaded guilty to manufacturing methamphetamine at Birch and Mines and that he had not been promised anything by the district attorney or the judge that took his plea regarding what he might expect at sentencing. He also testified that he had not been sentenced yet, that his sentencing hearing had been postponed, and that he was subsequently asked to testify at defendant's

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[4] Officer Pickens testified that he arrested Moniz, Gruwell, and defendant for manufacturing methamphetamine, possession of chemicals with the intent to manufacture methamphetamine, possession of methamphetamine for sale, possession of methamphetamine, possession of paraphernalia, and possession of a firearm at a methamphetamine lab. Officer Frechette testified that he arrested Davis and Atwood on the same charges. Officer Pickens explained that as the investigation progressed, the district attorney made decisions regarding the sufficiency of the evidence to support the charges and which charges to pursue through trial. He also testified that there are many factors that determine what charges a person eventually pleads guilty to.

trial. Moniz told the jury he was in a residential treatment program with the Salvation Army. Initially, he told the jury he was not hoping to receive any benefit as a result of his testimony in this case. Later, he admitted that he hoped that by being cooperative, the prosecutor would speak up for him at the time of his sentencing, so that he could continue in a treatment program. There was also testimony that Moniz approached law enforcement about making a deal, that he changed his story during the investigation, and that he had intended to flee the country to avoid prosecution.

Gruwell testified that she had been charged with manufacturing at both Birch and Mines, that she pleaded guilty to manufacturing at Birch, and that the charges regarding Mines were dismissed. She told the jury she had not been promised anything by the court or the district attorney and that she would be "judged on her recovery" and what she had "been doing at Amicus House." Thus, the jury knew that she was in a treatment program. She also testified that she had not been sentenced yet and that she did not expect any benefit from her testimony. The jury also heard that Gruwell used, manufactured, and sold methamphetamine, that she possessed marijuana and paraphernalia, that she missed a court date and intended to flee the country, that she lied to the police regarding her identity at the time of her arrest, and that she kept information for the police.

As to the testimony of Moniz and Gruwell, assuming the trial court erred in limiting defense counsel's cross-examination as alleged in defendant's fourth and fifth claims of error, the error was not prejudicial since the evidence was ultimately placed before the jury. The jury heard that Moniz and Gruwell were awaiting sentencing when they testified at defendant's trial and both witnesses testified on the issue of whether they hoped to receive any benefits from the prosecution in exchange for their testimony. Moniz admitted he did; Gruwell said she did not. In addition, the jury heard that these witnesses made and used methamphetamine, were not forthright with law enforcement, and had planned to flee the country to avoid prosecution. As to these witnesses, any error was clearly harmless beyond a reasonable doubt.

As noted before, Davis told the jury that he had been tried for manufacturing and selling methamphetamine, that his trial resulted in a hung jury, that he subsequently pleaded guilty to a lesser charge, and that he had spent 9 to 10 months in jail. The nature of the lesser charge was not clear from Davis's testimony. At one point, he testified that it was aiding and abetting defendant by being in possession of precursors; later he said he pleaded guilty to intent to manufacture and intent to sell on an aiding and abetting theory.

Unlike Moniz and Gruwell, the jury did not hear that Davis was awaiting sentencing or whether he hoped to receive a benefit from the prosecution in exchange for his testimony. There was no testimony on these points. The jury may have been able to infer that Davis had not been sentenced from the facts that Davis pleaded guilty to the lesser charges in August 2002, that he testified against defendant just four months later, that other witnesses had not been sentenced, and that Moniz's sentencing hearing had been continued.

In our discussion of the testimony of Moniz and Gruwell, we assumed, without deciding the issue, that the court's failure to allow cross-examination on these points was error. We held that any error was harmless because Moniz and Gruwell had testified on these points. The analysis is more complex when it comes to Davis. In addition to precluding cross-examination on Davis's sentencing status and his expectations, if any, of leniency in exchange for his testimony, the court prohibited defense counsel from cross-examining Davis regarding his receipt of immunity. In our view, this was error. On cross-examination, an accused is entitled to explore the inducements from the prosecution that may have motivated the witness's testimony, including a grant of immunity. (*Rodriguez, supra,* 42 Cal.3d at. p. 750; see also Cal. Criminal Law: Procedure and Practice (Cont.Ed.Bar 7th ed. 2004) §§ 25.21-25.22, pp. 659-660.) In light of the error in excluding evidence of Davis's grant of immunity, we shall assume for the sake of analysis, that the court also erred when it excluded evidence related to Davis sentencing status and any expectations of leniency he may have had.

Having found error in the exclusion of evidence related to Davis's potential bias, we must determine whether that error was prejudicial. Citing *Van Arsdall, supra*, 475 U.S. at page 684, defendant contends the error should be reviewed under the standard set forth in *Chapman, supra*, 386 U.S. 18 and that we must determine whether the error was harmless beyond a reasonable doubt. Based on *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103 and *People v. Steele* (2000) 83 Cal.App.4th 212, 224-225, the Attorney General argues that we should review this error under the standard set forth in *People* v. *Watson*, *supra*, 46 Cal.2d 818, 836. Even if we apply the higher *Chapman* standard, we conclude, on the facts of this case, that the error was not prejudicial because it was harmless beyond a reasonable doubt.

"*Van Arsdall* emphasized that a trial judge has broad latitude in restricting cross-examination which is repetitive or only marginally relevant. [Citation.] There is no Sixth Amendment violation at all unless the prohibited cross-examination might reasonably have produced 'a significantly different impression of [the witness's] credibility . . . .') [Citation.] If cross-examination was improperly restricted, the prejudicial effect of the error on the trial as a whole depends on a multitude of factors, including the cumulative nature of the lost information, the extent of cross-examination otherwise permitted, the degree of evidence corroborating the witness, and the overall strength of the prosecution case. [Citation.]" (*Rodriguez*, *supra*, 42 Cal.3d at p. 750, fn. 2.)

Defense counsel followed the court's recommendation and went to great lengths to impeach Davis. At least three times during cross-examination, Davis admitted that he lied under oath and told a different story at his trial. The jury in this case heard that Davis failed to tell the jury at his own trial that he had assisted defendant in transporting the buckets of methamphetamine solution from Mines to Clayton. Davis admitted that at his own trial he lied about whether he had ever looked inside the trailer, whether he had any way of communicating with defendant after they moved the trailer to Clayton, and

what defendant had offered to pay him the $2,000 for.[5] Davis testified that the story he told the police differed from what he said at his own trial. Defense counsel then attempted to impeach Davis with inconsistencies between his statements to the police and his trial testimony. Davis admitted that he would act in his own best interest whenever possible and that protecting himself was more important than the oath he took at the time of his trial. Defense counsel also tried to impeach Davis with factual discrepancies between his testimony at his own trial and his testimony in this case. The jury heard that the prosecutor who appeared in this case also prosecuted Davis. Davis admitted he had a prior conviction for hit and run with property damage. He had also been convicted of driving on a suspended license. As a result thereof, he spent 20 days in jail and was on probation for two years. Davis admitted that he continued to drive on a suspended license for a total period of 10 years. Since Davis was an accomplice, the jury was instructed to view his testimony with caution.

Information regarding the grant of immunity would not have added significantly to the already formidable attack on Davis's credibility. In light of defense counsel's comprehensive cross-examination of Davis, the evidence corroborating Davis's testimony, and the overall strength of the prosecution case, we conclude that the prohibited cross-examination would not reasonably have produced a significantly different impression of Davis's credibility (*Rodriguez*, *supra*, 42 Cal.3d at p. 750, fn. 2) and that any error in limiting defendant's cross-examination of Davis was harmless beyond a reasonable doubt.

According to defense counsel, Atwood pleaded guilty to simple possession of precursors. The court found this was not a crime of moral turpitude that could be used to impeach her. The court was correct and defendant does not challenge that ruling.

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[5] At his own trial, Davis told the jury defendant brought the trailer and the cans of the chemical solution to his property and then offered him $2,000 to move the trailer from Clayton to another location.

(*People v. Castro* (1985) 38 Cal.3d 301, 317 [simple possession of a controlled substance is not a crime involving moral turpitude].) At trial, Atwood nonetheless testified that she had pleaded guilty to an unspecified charge and that neither the district attorney nor the court that took her plea had promised her anything in exchange for her testimony against defendant. Since evidence of Atwood's conviction was not admissible for impeachment, the court did not err in excluding evidence that she had not yet been sentenced or that she may have hoped for leniency in exchange for her testimony. Even if it was error to limit cross-examination in this manner, given Atwood's limited role in the case, the information was only marginally relevant such that any error was harmless beyond a reasonable doubt.

Defendant's final claim of error under this heading is that the trial court erred when it excluded evidence that Gruwell had submitted a false urine sample to the probation department. A prior felony conviction may be used to impeach a witness unless he or she has been pardoned or discharged. (Evid. Code, § 788.) The prior conviction must involve moral turpitude. (*People v. Collins* (1986) 42 Cal.3d 378, 389.) There was no evidence that Gruwell had been convicted of any crimes as a result of this conduct. In addition, this information does not implicate any claim of bias in favor of the prosecution. We therefore conclude that the trial court did not err when it excluded evidence regarding the false urine sample.

### *IV. Trial Court's Ruling Regarding Hearsay Statements by Moniz*

Defendant complains that the trial court erred in admitting a hearsay statement during the following direct examination of Moniz:

"[PROSECUTOR]: In any case, September 2001 you're facing these charges and you decide – and it's at this time that you meet [defendant], it that correct?

"[MONIZ]: Right. I was trying to build up, started to building up my finances because, like I said, I was falling behind, losing my home and everything. [¶] And

somebody sold me some red phosphorous that originally had come from [defendant] from what I understand, and –

"[DEFENSE COUNSEL]: Your honor, I'd make a hearsay objection.

"THE COURT: That portion is stricken.

"[DEFENSE COUNSEL]: Thank you.

"[PROSECUTOR]: Your Honor, it's not for the truth of the matter asserted, simply to show connection.

"THE COURT: That portion is stricken.

"[PROSECUTOR]: Was it your understanding then that [defendant] may be somebody who could help you?

"[MONIZ]: Yeah. Well, the person that sold me the red phosphorous told me that it came from –

"[DEFENSE COUNSEL]: Your Honor, again hearsay.

"THE COURT: Overruled. Overruled.

"[PROSECUTOR]: Mr. Moniz, if you can be very careful about what people tell you and what you actually know.

"[MONIZ]: It's what I actually knew.

"[PROSECUTOR]: Thank you.

"[MONIZ]: Okay. Anyways, they brought him over after I purchased the red phosphorous. We discussed a few things. I took him over to Robert Vega's residence . . ."

We review the court's evidentiary rulings for an abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 201; *People v. Rowland* (1992) 4 Cal.4th 238, 264 [admissibility of hearsay].) Just before testifying as outlined above, Moniz told the jury that the person who sold him the red phosphorous told him that defendant had a rural property up in the mountains that Moniz could run away to. As defendant notes, defense counsel's first hearsay objection was sustained and the testimony was stricken. The

prosecutor's next question asked whether Moniz understood that defendant was someone who could help him. The question itself did not call for hearsay and the court most likely interpreted it as referring to the earlier testimony regarding defendant's mountain property. Moniz apparently misunderstood the question and his response appeared as if it was going to include hearsay statements. But before Moniz could complete his answer, the prosecutor cut him off and instructed him to distinguish between what others had told him and what he knew and only testify regarding what he knew. Without completing his response, Moniz stated that it was something he knew.

The court did not err by overruling the second hearsay objection since the question did not call for hearsay and Moniz never finished his answer. In addition, the court had stricken the previous testimony that suggested that defendant was selling red phosphorous. Under the circumstances here, we find no abuse of discretion.

Even if the court erred in overruling defendant's second objection, given the peripheral nature of the testimony and the overwhelming evidence of manufacturing, it is not reasonably probable that the result would have been more favorable in the absence of the error. (*People* v. *Watson*, *supra*, 46 Cal.2d 818, 836.)

### *V. Alleged Ineffective Assistance of Counsel in Failing to Object to Hearsay Statements By Investigating Officers*

Defendant complains of three occasions in which "the prosecutor elicited inadmissible and prejudicial hearsay testimony without objection by defense counsel." He contends his trial counsel provided him ineffective assistance by failing to object.

Defendant claims ineffective assistance when his counsel failed to object to the second question in the following excerpt from the redirect examination of Officer Frechette:

"[PROSECUTOR]: So was it your understanding or your belief at that time that if you arrested Mr. Davis and Mrs. Atwood it would curtail any cooperation they may give you in locating [defendant]?

"[OFFICER]: Correct

"[PROSECUTOR]: And was it your understanding based upon the tips that you received on the street and the ongoing investigation coming from Mines Road that [defendant] was putting pounds and pounds of methamphetamine into the community?

"[OFFICER]: Correct.

"[PROSECUTOR]: And were you weighing, I guess, the lesser of two evils, if you will?

"[OFFICER]: Correct."

Defendant also complains of the failure to object to the following question on redirect examination of Officer Pickens:

"[PROSECUTOR]: Let's start with what you knew when you came to this property or what you suspected, where your investigation was. [¶] At the time that you made contact with Davis and Atwood, was it your understanding from other sources that there may have been cooks as large as 60 pounds of methamphetamine being manufactured up at Mines Road, correct?

"[OFFICER]: That is correct."

The prosecutor then asked Officer Pickens questions regarding the street value of a pound of methamphetamine. Shortly thereafter, the prosecutor asked Officer Pickens:

"[PROSECUTOR]: So your information was that 60 pounds of methamphetamine at a time was being distributed or being produced on [defendant's] property, correct?

"[OFFICER]: That was our suspicion. That was the information that we had received, yes.

"[PROSECUTOR]: And the nature of your investigation, is that considered a large scale laboratory?

"[OFFICER]: Absolutely."

Officer Pickens then testified that this was one of the larger labs his agency had seen and that they were looking for defendant because he was the key to both locations.

That was one of the reasons the investigating officers did not arrest Davis and Atwood when they first contacted them.

"[A] defendant claiming ineffective assistance of counsel under the federal or state Constitution must show both deficient performance under an objective standard of professional reasonableness and prejudice under a test of reasonable probability of a different outcome. [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 445 (*Ochoa*) citing *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

"It is not deficient performance for a criminal defendant's counsel to make a reasonable tactical choice. [Citations.] Reasonableness must be assessed through the likely perspective of counsel at the time. '[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." ' (*Strickland v. Washington* (1984) 466 U.S. 668, 689 . . . .)" (*Ochoa, supra*, 19 Cal.4th at pp. 445-446, fn. omitted.)

" 'Tactical errors are generally not deemed reversible; and counsel's decisionmaking must be evaluated in the context of the available facts. (*Strickland v. Washington, supra*, 466 U.S. at p. 690 . . . .) To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . ." [Citation.] Finally, prejudice must be affirmatively proved; the record must demonstrate "a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." [Citations.]' [Citations.]" (*People v. Hart* (1999) 20 Cal.4th 546, 623-624.)

The record fails to disclose why defense counsel failed to object to the questions at issue. The Attorney General argues that the questions and answers were not hearsay because they were not offered for the truth of the matter asserted (that defendant was putting pounds of methamphetamine onto the street), but were offered to explain why the officers acted the way they did and why they did not arrest Davis and Atwood when they visited Clayton on January 31, 2002. We agree.

Even if we were to find that the questions called for hearsay, we are not persuaded that defense counsel's failure to object was unreasonable. By the time these questions were asked, the jury had already heard that the investigation had uncovered numerous indicia of manufacturing at Mines, as well as two 55-gallon drums and several 5-gallon buckets of methamphetamine solution and the crushed metal cans at Clayton. The jury had seen photographs of the buckets, drums, flattened cans, flask, chemicals, and other equipment located at Mines and Clayton and had an idea of the magnitude of the contraband involved. The jury had also heard that defendant had told Moniz that he could make 15 pounds of methamphetamine at a time using his method of manufacture and that the material in the cans came from a "large, four-pot" cook that had produced 60 pounds of methamphetamine. Moniz testified that he had told the investigating officers before they went to Clayton that there had been a bad cook at Mines and that defendant had moved methamphetamine solution from Mines to Clayton. The officers testified that Moniz had told them that 40 gallons or 40 pounds of methamphetamine and solution were being stored at Clayton. The jury had already heard that the officers had obtained information that defendant was involved in manufacturing large quantities of methamphetamine from Moniz and Gruwell. When viewed in the context of the evidence

that had been presented before, it was not unreasonable for defense counsel not to object to the questions outlined above.

Even if we find error in the admission of this testimony, defendant has failed to show that but for his counsel's failure to object to the hearsay questions outlined above the result of the proceeding would have been different. Two of the questions at issue served merely as background, establishing the amount of methamphetamine involved and allowing the officers to comment on the size of the lab, the street value of the drugs produced, and the importance of contacting defendant. In light of the overwhelming evidence of defendant's guilt we find no prejudice.

### *VI. Alleged Prosecutorial Misconduct and Ineffective Assistance of Counsel Related to Prosecutor's Closing Argument*

Defendant contends the prosecutor committed misconduct in his closing argument by using examples of crimes that were not at issue in this case to illustrate some of the legal principles the jury would have to apply. Defendant also asserts that defense counsel was ineffective in failing to object to the prosecutor's repeated references to violent crimes and his improper appeal to the passion of the jury in the examples he used in his closing argument.

To explain the concept of aiding and abetting, the prosecutor used the example of a bank robbery in which an individual gives the bank robber a gun and waits outside the bank in a getaway car. He then contrasted the case of a defendant who is liable on an aiding and abetting theory with the case of an innocent individual who just happens to be sitting in his car outside the bank when the robbery occurs without any knowledge of the perpetrator's unlawful purpose. The prosecutor returned to the bank robbery analogy to explain the probable consequences doctrine of aider and abetter liability. In the latter example, the robber killed a bank employee. The prosecutor used the example of a murder case to illustrate some of the concepts related to conspiracy. He used the example of buying rope to strangle someone to illustrate the nature of an overt act necessary to

support a finding of conspiracy. To illustrate the nature of the agreement necessary for liability to attach under a conspiracy theory, the prosecutor argued that if one conspirator had agreed to kill the victim and another conspirator had only planned to "chop [the victim's] leg off," then there would not be the agreement necessary to find a conspiracy. He used the example of two men filling dime bags of marijuana to illustrate the concept of an implied conspiracy. In discussing the corroboration requirement for accomplice testimony, the prosecutor used the example of two suspects who were both found standing over a woman's dead body and then discussed the application of the corroboration rule in the event one of the suspects testified against the other.

"The applicable federal and state standards regarding prosecutorial misconduct are well established. ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214 . . . ; *People v. Espinoza* (1992) 3 Cal.4th 806, 820 . . . .) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841; accord, *People v. Hill* (1998) 17 Cal.4th 800, 819.)

Defendant contends the prosecutor committed misconduct because the examples he used involved violent crimes that were purposefully chosen to inflame the jury. While the prosecutor's argument included references to violent crimes, it also discussed innocent conduct that might not amount to aiding and abetting or the agreement necessary for a conspiracy. Overall, the examples were helpful in illustrating some of the legal concepts the jury was going to have to address. The prosecutor illustrated some of the legal principles at issue by references to both the examples set forth above and the evidence in this case. After reviewing the argument in its entirety, we conclude the

references to other crimes in the prosecutor's argument did not amount to a pattern of conduct so egregious that it infected the trial with such unfairness as to make the conviction a denial of due process under the federal standard nor did they involve the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury such that they violated the state standard. We therefore find no prosecutorial misconduct.

Defendant also contends his defense counsel provided ineffective assistance when she failed to object to the prosecution's use of these examples in his closing argument. The standards we apply to a claim of ineffective assistance are set forth above. The defendant in *People v. Carpenter* (1997) 15 Cal.4th 312, 396 argued that his attorney was ineffective for failing to object to the prosecutor's argument. The court held that "[d]eciding whether to object is inherently tactical, and the failure to object will seldom establish incompetence." This is especially true, where as was the case here, the claims of prosecutorial misconduct lack merit. (*Ibid.*)

### *VII. Cumulative Error*

Having found no error, we reject defendant's claim of cumulative error.

### *VIII. Sentencing Error: Enhancement for Being Personally Armed With a Firearm*

Defendant contends the trial court erred by imposing a four-year enhancement[6] for being personally armed with a firearm (Pen. Code, § 12022, subd. (c)) on count 1 (conspiracy to manufacture methamphetamine at Mines) because the enhancement may not be imposed where the underlying charge is conspiracy. Defendant argues that the Penal Code section 12022, subdivision (c) enhancement only applies to cases involving the felonies that are enumerated in the statute and that conspiracy is not one of those felonies. Although the jury made a true finding on the same enhancement allegations in

[6] At sentencing, the court imposed the middle term of four years consecutive for the Penal Code section 12022, subdivision (c) enhancement.

count 3 (manufacturing methamphetamine, § 11379.6), defendant contends the enhancement cannot be applied to that count, since the court stayed his sentence on count 3. For these reasons, defendant asserts that the enhancement must be stricken.

The Attorney General correctly concedes error in the imposition of the four-year enhancement on count 1, since conspiracy is not one of the felonies enumerated in the statute.[7] The Attorney General submits that since the same enhancement was imposed on count 3, the manufacturing charge (§ 11379.6), and the manufacturing charge is one of the offenses enumerated in Penal Code section 12022, subdivision (c), the matter should be remanded to the trial court to reexamine and, if necessary, revise its discretionary sentencing choices. We agree that remand is appropriate in this case and shall remand the matter to the trial court for resentencing as to the enhancement. (*People v. Castaneda* (1999) 75 Cal.App.4th 611, 614.)

***IX. Blakely Error***

While this case was pending on appeal, the United States Supreme Court decided *Blakely, supra,* ___U.S. ___ [124 S.Ct. 2531], which held that a sentence that exceeded the statutory maximum of the standard range for the offense based on factual findings that were made by the court, rather than factual findings that were made by a jury or admitted to by the defendant, violated the defendant's Sixth Amendment right to trial by jury.

[7] Penal Code section 12022, subdivision (c) provides: "Notwithstanding the enhancement set forth in subdivision (a), any person who is personally armed with a firearm in the commission of a violation or attempted violation of Section 11351, 11351.5, 11352, 11366.5, 11366.6, 11378, 11378.5, 11379, 11379.5, or 11379.6 of the Health and Safety Code, shall be punished by an additional and consecutive term of imprisonment in the state prison for three, four, or five years."

### A. Brief Summary of *Blakely*

The defendant in *Blakely* pleaded guilty to second degree kidnapping involving domestic violence and the use of a firearm. The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months under Washington law. (*Blakely, supra*, __ U.S. __, [124 S.Ct. at pp. 2534-2535].) Washington law provides that the court may impose a sentence above the standard range if the court finds substantial and compelling reasons justifying the exceptional sentence. After hearing the victim's description of the ordeal, the court imposed a 90-month sentence on the ground that the defendant had acted with "deliberate cruelty," one of the statutorily enumerated grounds for departing from the standard sentencing scheme. (*Id.* at p. 2535.)

Faced with a more than three-year increase in his sentence, the defendant objected. The court therefore conducted a three-day bench trial on the issue of deliberate cruelty and concluded that there were sufficient facts to support its initial finding. (*Blakely, supra*, __ U.S. __, [124 S.Ct. at pp. 2535-2536].) The defendant appealed, arguing that this sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence.

The United States Supreme Court agreed and reversed. The court applied the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*) which provides: " 'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.' " (*Blakely, supra*, __ U.S. __, [124 S.Ct. at p. 2536].) The court explained "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he [or she] may impose *without* any additional findings." (*Id.* at p. 2537.)

Summarizing previous cases on this issue, the court explained that "[w]hether the judge's authority to impose an enhanced sentence depends on finding a specified fact . . . , one of several specified facts . . . , or *any* aggravating fact (as [in *Blakely*]), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact." (*Id.* at p. 2538, fn. omitted.) The court concluded that the defendant's sentence was invalid because it depended on a judicial finding of deliberate cruelty. (*Ibid.*)

**B. Parties' Contentions Regarding *Blakely* Error**

In supplemental briefing, defendant challenges his sentence, arguing that the court violated *Blakely* when it imposed the upper term on the first conspiracy count based on factual findings that were neither found by a jury nor admitted by defendant. He also contends that the court applied the wrong standard of proof, applying a preponderance of the evidence standard rather than the proof beyond a reasonable doubt standard required by *Blakely*.

The Attorney General argues that defendant has forfeited his claim of *Blakely* error, that *Blakely* does not apply to California's determinate sentencing rules as applied in this case because defendant was subject to a life sentence under the Three Strikes law, and that even if *Blakely* does apply, any error was harmless beyond a reasonable doubt.

**C. Defendant's Sentence**

After defendant waived his right to a jury trial on the prior conviction allegations, the court found true allegations that he had suffered two prior serious felony convictions within the meaning of the Three Strikes Law (Pen. Code, §§ 667, subd. (b)-(i), 1170.12). The court found that in 1983 defendant had been convicted of a liquor store robbery (Pen. Code, § 211) and a residential burglary (Pen. Code, § 459). Defendant had been sentenced to four years in prison for the robbery and eight months consecutive for the

burglary. The court granted defendant's *Romero* motion in part and struck the prior burglary conviction and left the robbery conviction intact.

The court sentenced defendant to the upper term of seven years on the first count for conspiracy to manufacture methamphetamine, doubled that term to 14 years pursuant to the Three Strikes law (Pen. Code, § 1170.12, subd. (c)(1)), and added four years for the enhancement for being personally armed with a firearm, for a total of 18 years. The court sentenced defendant to 14 years on the second conspiracy count, 14 years for manufacturing methamphetamine, and six years for providing a space for the manufacture of methamphetamine. The court stayed the sentences on the latter three counts pursuant to Penal Code section 654, reasoning that the crimes were "all part of a grand pattern" and "an all encompassing series of events."

Contrary to the requirements of Penal Code section 1170 and California Rules of Court, rule 4.420(e),[8] the court did not state its reasons for selecting the upper term on the record. The probation report listed the following factors in aggravation: (1) "[t]he manner in which the crime was carried out indicates planning, sophistication, or professionalism" (Cal. Rules of Court, rule 4.421(a)(8)); (2) "[t]he crime involved a large quantity of contraband" (Cal. Rules of Court, rule 4.421(a)(10)); (3) "[t]he defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings

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[8] Penal Code section 1170, subdivision (b) provides in part: "The court shall set forth on the record the facts and reasons for imposing the upper or lower term." Subdivision (c) of the statue provides in part: "The court shall state the reasons for its sentence choice on the record at the time of sentencing." This requirement is reiterated in California Rules of Court, rule 4.420(e), which provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Defendant does not assert any claim of error related to the trial court's failure to state the reasons for its discretionary sentencing choices on the record. Even if he did, any such claim of error was waived by his failure to object in the trial court. (*People v. Gonzalez* (2003) 31 Cal.4th 745, 751-752.)

are numerous or of increasing seriousness" (Cal. Rules of Court, rule 4.421(b)(2); and (4) "[t]he defendant has served a prior prison term" (Cal. Rules of Court, rule 4.421(b)(3)). The probation report did not list any factors in mitigation.

**D. Forfeiture/Waiver**[9]

The term "waiver" has been applied both to the intentional relinquishment of a known right and the forfeiture of a claim by failing to timely assert it. (*People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6 (*Saunders*).) " ' "The purpose of the general

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[9] This court recently addressed the forfeiture issue in *People v. Barnes* (2004) 122 Cal.App.4th 858, 876-879, petition for review pending, petition filed November 2, 2004, *People v. Jaffe* (2004) 122 Cal.App.4th 1559, 1580-1583, petition for review pending, petition filed November 19, 2004, and *People v. Ackerman* (Nov. 18, 2004, H026899) ___ Cal.App.4th ___ (*Ackerman*), and concluded that a defendant does not forfeit his claim of *Blakely* error by failing to object on the basis of *Apprendi* in the trial court.

Several other courts have addressed the forfeiture/waiver issue. Divisions One and Two of the Fourth District Court of Appeal have concluded that *Blakely* contentions were not forfeited by the defendant's failure to assert them in the trial court. (*People v. Ochoa* (2004) 121 Cal.App.4th 1551, 1564-1565, review granted Nov. 17, 2004, S128417 [involving consecutive sentencing]; *People v. George* (2004) 122 Cal.App.4th 419, 424, petn. for review pending, petn. filed Oct. 19, 2004 [involving an upper term sentence]; *People v. Lemus* (2004) 122 Cal.App.4th 614, 619-620, petn. for review granted Dec. 1, 2004 [upper term]; *People v. Fernandez* (2004) 123 Cal.App.4th 137,142, petn. for review pending, petn. filed Nov. 19, 2004 [upper term].)

The First District Court of Appeal, Divisions Two and Five, and the Second District Court of Appeal, Divisions Four and Seven, have also rejected the Attorney General's forfeiture argument. (*People v. Butler* (2004) 122 Cal.App.4th 910, 918-919 petn. for review pending, petn. filed Nov. 3, 2004 [upper term]; *People v. Vaughn* (2004) 122 Cal.App.4th 1363, 1368-1369, petn. for review pending, petn. filed Nov. 5, 2004 [upper term and consecutive sentences]; *People v. Picado* (Nov. 5, 2004, A102251) ___ Cal.App.4th ___ [upper term and consecutive sentences]; *People v. Juarez* (Nov. 16, 2004, B165580) ___ Cal.App.4th ___ [upper term].)

However, the Third District has held that *Blakely* issues are forfeited by the failure to object on the basis of *Apprendi* in the trial court. (*People v. Sample* (2004) 122 Cal.App.4th 206, 216-227, petn. for review granted Dec. 1, 2004 [upper term].) *Sample* did not discuss the futility of making such an objection, one of the issues presented in this case.

doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had . . . .' " (*People v. Walker* (1991) 54 Cal.3d 1013, 1023.) ' "No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." [Citation.]' [Citation.]" (*Saunders, supra*, 5 Cal.4th at p. 590, fn. omitted.)

As *Blakely* observed, "nothing prevents a defendant from waiving his [or her] *Apprendi* rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding. [Citations.] If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his [or her] interest if relevant evidence would prejudice [the defendant] at trial." (*Blakely, supra*, ___ U.S. at p. ___, [124 S.Ct. at p. 2541].)

The Attorney General relies on *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*). In *Scott*, the California Supreme Court concluded, "the waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices. Included in this category are cases in which the stated reasons allegedly do not apply to the particular case . . . ." (*Id.* at p. 353.) The court held, "[A] criminal defendant cannot argue for the first time on appeal that the court . . . aggravated a sentence based on items contained in a probation report that were erroneous or otherwise flawed [citation]." (*Id*. at pp. 351-352, fn. omitted.)

In our view, the waiver rule from *Scott* does not apply to claims of *Blakely* error. In *Scott*, the court reasoned that its waiver rule was necessary to facilitate the prompt detection and correction of error in the trial court, thus reducing the number of appellate

claims and preserving judicial resources. (*Scott, supra*, 9 Cal.4th at pp. 351, 353.) However, *Scott's* pragmatic rationale does not support the application of the waiver rule here. Prior to *Blakely*, California courts and numerous federal courts consistently held that there was no constitutional right to a jury trial in connection with a court's imposition of consecutive sentences. (*People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231; *U.S. v. Harrison* (8th Cir. 2003) 340 F.3d 497, 500; *U.S. v. Lafayette* (D.C. Cir. 2003) 337 F.3d 1043, 1049-1050; *U.S. v. Hernandez* (7th Cir. 2003) 330 F.3d 964, 982; *U.S. v. Davis* (11th Cir. 2003) 329 F.3d 1250, 1254; *U.S. v. Chorin* (3d Cir. 2003) 322 F.3d 274, 278-279; *U.S. v. Lott* (10th Cir. 2002) 310 F.3d 1231, 1242-1243; *U.S. v. White* (2d Cir. 2001) 240 F.3d 127, 136.) No published case in California held that a different rule applied in connection with the imposition of an upper term sentence. In light of this state of the law, the assertion of a challenge to the imposition of an upper term sentence would not have achieved the purpose of prompt detection and correction of error in the trial court. Moreover, since *Blakely* was decided after defendant's sentencing, defendant cannot be said to have knowingly and intelligently waived his right to a jury trial.

Because of the constitutional implications of this claim of error, we question whether the forfeiture doctrine applies at all. (See *People v. Vera* (197) 15 Cal.4th 269, 276-277 [claims asserting deprivation of certain fundamental constitutional rights are not forfeited by failure to object].)

Defendant argues that an objection is not required when it is futile under controlling precedent. As the court explained in *People v. Welch* (1993) 5 Cal.4th 228, 237-238, "Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence. [Citations.]"

"Prior to *Apprendi*, California courts had expressly rejected the argument that there was any right to a jury trial on sentence aggravating factors apart from death

penalty cases under Pen. Code, § 190.3. (*People v. Williams* (1980) 103 Cal.App.3d 507, 510; *People v. Betterton* (1979) 93 Cal.App.3d 406, 410-413.) California has conferred statutory rights to jury trial on enhancements (Pen. Code, § 1170.1, subd. (e)) and the issue 'whether or not the defendant has suffered' an alleged prior conviction. (Pen. Code, § 1025, subd. (b); cf. § 1158.) The California Supreme Court characterized these statutory rights as 'limited' in *People v. Wiley* (1995) 9 Cal.4th 580, 589 (*Wiley*). Relying on *McMillan* [*v. Pennsylvania* (1986)] 477 U.S. 79, *Wiley* stated that there was no federal or state constitutional right to a jury determination of 'the truth of prior conviction allegations that relate to sentencing.' (*Wiley, supra*, 9 Cal.4th at p. 586.) *Wiley* explained: '[T]he ability of courts to make factual findings in conjunction with the performance of their sentencing functions never has been questioned. From the earliest days of statehood, trial courts in California have made factual determinations relating to the nature of the crime and the defendant's background in arriving at discretionary decisions in the sentencing process . . . .' (*Ibid*.)

"Currently, under the provisions of the Determinate Sentencing Act, trial courts are assigned the task of deciding whether to impose an upper or lower term of imprisonment based upon their determination whether 'there are circumstances in aggravation or mitigation of the crime,' a determination that invariably requires numerous factual findings. [Citation.] Similarly, trial courts are called upon to make factual determinations in their decision whether to impose consecutive sentences." (*Wiley, supra*, 9 Cal.4th at p. 587.) The California Supreme Court has stated there is no constitutional right to a jury trial on an enhancing factor (*People v. Wims* (1995) 10 Cal.4th 293, 304) and on a prior prison term allegation (*People v. Vera*, *supra*, 15 Cal.4th at p. 277).

In 2001, the California Supreme Court explained that *Apprendi* had implicitly overruled part of its earlier holding in *People v. Wims, supra*, 10 Cal.4th 293. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.) But *Apprendi* was understood to apply to

sentence enhancements, not to aggravating factors. In light of the above precedent, we conclude that it was reasonable for a defense attorney not to object at sentencing that the court could only rely on facts found by the jury beyond a reasonable doubt. The holding of *Blakely* was sufficiently unforeseeable that we find no forfeiture due to defendant's failure to object at sentencing.

For all these reasons, we conclude that defendant did not waive his claims of *Apprendi* or *Blakely* error by failing to object in the trial court.

**D. Application of *Blakely* to Defendant's Sentence**

The question of whether *Blakely* precludes a trial court from making findings on aggravating factors in support of an upper term sentence is currently under review by the California Supreme Court. (*People v. Towne,* review granted July 14, 2004, S125677; *People v. Black,* review granted July 28, 2004, S126182.) Pending resolution of this issue by the Supreme Court, we must undertake a determination of whether *Blakely* applies under the circumstances presented here.

The first step in applying *Blakely* to defendant's sentence is to determine the statutory maximum sentence the court may impose without any additional factual findings. The Attorney General relies on the trial court's finding that defendant had suffered two prior convictions that qualified as strikes under the Three Strikes Law and argues that defendant's statutory maximum was life in prison because he had suffered two strike priors. The Attorney General asserts, "California has a system of enhancements and alternate sentencing schemes, by which a sentence can be extended beyond the standard range imposed by the Legislature," which must be pleaded and proven to the jury beyond a reasonable doubt. The Attorney General argues, "California satisfies *Blakely's* requirement that, before a defendant can be sentenced outside the standard range identified by the Legislature . . . , a jury must find beyond a reasonable

doubt that the defendant is eligible for an enhancement or alternative scheme that exposes the defendant to a higher sentence."

As the court stated in *Blakely*, "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Blakely, supra*, __ U.S. __, [124 S.Ct. at p. 2537].) Moreover, *Blakely* does not require a jury determination of the fact of a prior conviction. (*Id.* at pp. 2536, fn. 5 & 2537.) In addition, a defendant may waive his or her *Apprendi* rights and consent to judicial fact-finding regarding sentence enhancements or other components of a sentence. (*Id.* at p. 2541.) Defendant consented to judicial fact-finding regarding the prior convictions that exposed him to a Three Strikes sentence. Once the court found that defendant had suffered two prior convictions that qualified as strikes, defendant was subject to a maximum statutory penalty of 25 years to life. (Pen. Code, § 1170.12, subd. (c)(2).)

The question then becomes, how does the court's decision to strike one of the strikes affect the analysis? The Attorney General argues that the trial court's decision to strike one of the prior convictions did not change defendant's statutory maximum for constitutional purposes under *Blakely*, because it amounted to nothing more than a downward departure from the maximum sentence available. He argues, since defendant's sentence did not exceed the statutory maximum of life in prison, the constitutional mandates of *Blakely* were not implicated.

" 'The striking or dismissal of a charge of prior conviction . . . is not the equivalent of a determination that defendant did not in fact suffer the conviction [citations] . . .' " (*People v. Garcia* (1999) 20 Cal.4th 490, 496.) In *Apprendi, supra*, 530 U.S. at pp. 481-482, after reviewing the history of the jury trial right at common law, the court stated, "We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion – taking into consideration various factors relating both to offense and offender – in imposing a judgment *within the range* prescribed by statute.

We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case."

We conclude that the fact that the court struck one of the strike priors does not impact our calculation of the statutory maximum penalty. Since defendant's statutory maximum sentence was 25 years to life, we conclude that his 18-year sentence did not violate *Blakely*.

## DISPOSITION

The judgment is reversed and the matter is remanded to the trial court for resentencing related to the enhancement for being armed with a firearm.

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McAdams, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P.J.

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Mihara, J.